

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 26.02.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.Nos.745 & 746 of 1997

Chidambara Udayar .. Appellant in both the second appeals
(Plaintiff in OS 158/88 and
Defendant in OS NO. 43/86)

vs.

Manicka Udayar .. Respondent in both the second appeals
(Defendant in OS NO. 158/88 and
Plaintiff in OS NO. 43/86)

Prayer: These second appeals have been preferred under Section 100 of CPC against the decree and Judgment dated 07.02.1996, in A.S.No.117 & 116 of 1992 respectively, passed by the Subordinate Judge, Ariyalur, confirming the decree and judgment dated 31.01.1992 in O.S.No.158/1988 & O.S.No.43/1986 respectively, on the file of the District Munsif, Ariyalur.

For Appellant : Mrs.Mythili Suresh (in both appeals)
For Respondent : Mr.C.Selvaraj, Senior Counsel
for Mr.S.Kamadevan (in both appeals)

COMMON JUDGMENT

These second appeals have been preferred against the decree and Judgment dated 07.02.1996, in A.S.No.117 & 116 of 1992 respectively, passed by the Subordinate Judge, Ariyalur. The plaintiff-Chidambara Udayar in O.S.No.158/1988 is the appellant before this Court. The Defendant-Chidamabara Udayar in O.S.No.43/1986 is the appellant herein. O.S.No.158/1988 was filed by one Chidambara Udayar for specific performance of a contract under Ex.B.3-sale agreement. O.S.No.43/1986 was filed by Manickkam Udayar for an order of permanent injunction restraining the defendant from taking water from a deep borewell in S.No.428/1 to the plaint schedule S.F.No.411/1 property.

2. The short facts in the plaint in O.S.No.158/1988 are as follows:-

2(a)The suit is for specific performance of a contract

on the basis of an agreement entered into between the plaintiff and the defendant dated 21.11.1987. As per the terms of the agreement the defendant should execute a sale deed in favour of the plaintiff in respect of the suit survey number property after receiving a sum of Rs.2,500/- before Sub-Registrar within three months from the date of agreement at the cost of the plaintiff. Since the defendant has refused to execute a sale deed inspite of repeated demands, the plaintiff (Chidambara Udayar) has filed the suit. The plaintiff had executed a nominal sale deed in favour of the defendant on 1.6.1976. The said sale deed was executed by the plaintiff only as a security for the alleged debt to be paid by the plaintiff to the defendant. It was orally agreed by the defendant to reconvey the suit property after receiving such amount from the plaintiff whenever demanded by the plaintiff. No possession was conveyed under the sale deed in favour of the defendant-Manikkam Udayar. The plaintiff approached the defendant many times with money and requested him to receive the amount and reconvey the suit property but the defendant was evading to do so. At the instigation of the enemies of the plaintiff, the defendant had filed O.S.No.43/1986 for bare injunction restraining the plaintiff from interfering with the suit property as if he is in possession and enjoyment of the suit property. The said suit was posted for trial on 20.11.1987 and then it was adjourned to 24.11.1987. After adjournment on 20.11.1987 the plaintiff met the defendant just before the Court premises and asked him to withdraw the case and settle the matter. As the defendant happened to be the own brother-in-law of the plaintiff, the defendant agreed for a compromise on the interference of some panchayatdars an agreement was entered into between both the parties on 21.11.1987 and as per the agreement, the defendant agreed to reconvey the suit property in favour of the plaintiff and also agreed to withdraw the case which stands posted to 24.11.1987. But on 24.11.1987 the defendant had not withdrawn the suit as per the stipulated condition of the agreement. After elaborate trial and argument the case was dismissed and ended in favour of this plaintiff who was the defendant in the said suit. Even after the dismissal of the said case the plaintiff approached the defendant to reconvey the suit property. The plaintiff is always ready and willing to perform his part of the contract. But the defendant had refused to do so, as seen from his oral evidence in O.S.No.43/1986. The plaintiff has also deposited Rs.2,500/- before this Court and is also prepared to pay the stamp charges and other documents.

Hence the suit.

2(b) The defendant has filed a written statement with the following contentions:-

There was an agreement entered into between the plaintiff and defendant on 21.11.1987 as alleged in the plaint. This defendant never agreed to sell the plaint schedule property for a sum of Rs.2,500/- to the plaintiff. The alleged agreement dated 21.11.1987 is a forged document. This defendant has not signed in the said agreement of sale dated 21.11.1987. The plaintiff has forged the signature of this defendant and filed the suit on the basis of the alleged agreement dated 21.11.1987. In respect of the suit property the defendant has filed O.S.No.43/1986 for an order of permanent injunction on the ground that this defendant is the absolute owner of the suit property. The said suit was posted for trial on 20.11.1987 and then adjourned to 24.11.1987 for evidence. On 24.11.1987 this defendant, who is the plaintiff in O.S.No.43/1986, was examined and the plaintiff in this suit, who is the defendant in O.S.No.43/1986 was also examined on the same date. The other side counsel also cross-examined the witnesses. On 24.11.1987 this defendant was examined in O.S.No.43/1986, the advocate on the either side has not mentioned anything about the alleged sale deed dated 21.11.1987 to this defendant who was examined as P.W.1 in that suit. But on 25.11.1987 this defendant (as P.W.1 in O.S.No.43/1986) was recalled and cross-examined further. Only on 25.11.1987 the other side counsel had informed about the sale agreement dated 21.11.1987. After cross-examining the witness the other side (plaintiff herein) apprehended that he will taste defeat in the said suit, forged the sale agreement dated 21.11.1987 with the help of his close friends and filed the same in the suit in O.S.No.43/1986. The said suit was dismissed. Against the decree and judgment this defendant (plaintiff in O.S.No.43/1986) has preferred an appeal in A.S.No.140/1988 on the file of the Court of Subordinate Judge, Ariyalur, which is still pending. With an intention to grab at the property of the defendant, the plaintiff has forged the said agreement of sale dated 21.11.1987 and filed in this suit. The sale deed executed in favour of the defendant on 1.6.1976 is a valid one. The said sale deed was not executed as a security for the debt borrowed by this defendant. The plaintiff never met this defendant after 20.11.1987 within the court premises and there was no panchayat conducted between the plaintiff and defendant as alleged in the plaint. The alleged sale agreement dated 21.11.1987 is not a valid one. Hence, the suit is liable to be dismissed with costs.

2(c) On the above pleadings the learned trial judge has framed three issues and one additional issue. On the side of the plaintiff, P.W.1 was examined and Ex.A.1 and A.2 were marked. On the side of the defendant, D.W.1 was examined and Ex.B.1 was marked.

3. O.S.No.43/1986 was filed by the plaintiff Manikkam Udayar for an order of bare injunction. The short facts of the case of the plaintiff in the plaint relevant for the purpose of deciding this appeal sans irrelevant particulars are as follows:-

3(a) This plaintiff has purchased the plaint schedule property on 1.6.1976 for a sum of Rs.3,000/-. He has also laid pipe lines from S.F.No.428/1 to the plaint schedule property to take water for the purpose of irrigation. The plaintiff has also spent Rs.1,000/- in improving the suit land. He is also raising cash crops like sugarcane, groundnut, Black gram and Sesame (Gingili) plants. The patta No.760 also stands in the name of the plaintiff and the plaintiff is paying kist to the suit property. Apart from the plaint schedule property the plaintiff is not having any other land within the jurisdiction of Govindapuram Village. From the date of purchase the plaintiff is irrigating the plaint schedule property by taking water from S.F.No.428/1. The defendant is the sister's husband of the plaintiff. But they are not in talking terms. Since the defendant has refused to settle the marriage between his son with the plaintiff's sister's daughter from 9.9.1985 the defendant is obstructing the plaintiff from taking water from S.F.No.428/1 to the suit property. The defendant is interfering with the peaceful possession and enjoyment of the suit property. The defendant is attempting to commit act of waste in the suit property by cutting and removing the live trees. The plaintiff is having huge family with 7 male children and 4 female children. The defendant is obstructing the plaintiff from harvesting sugarcane crops on 5.1.1986 thereby disturbing the plaintiff from settling the debt in Canara Bank through which he has raised loan for raising sugarcane to supply the same to the sugarcane factory. The defendant has also cut and removed the standing crops from the suit land in the year 1985 thereby preventing this plaintiff from discharging the previous loan. The plaintiff preferred a complaint with the police, but the police have directed the plaintiff to get necessary orders from the civil court. Hence, the plaintiff has filed this suit for an order of injunction.

3(b) The defendant in his written statement would contend that the suit property does not belong to the plaintiff. The alleged sale deed dated 1.6.1976 is not true and it does not convey any better title to the plaintiff. The defendant owes to plaintiff a sum of Rs.5,000/- and after discharging a portion of the said amount, the balance remains to be paid by the defendant to the plaintiff comes to Rs.3,000/-. Since the defendant could not discharge the debt in entirety he executed a nominal sale deed in favour of the plaintiff for the said consideration of Rs.3,000/- and it was agreed between the parties at the time of alleged sale whenever the defendant pays Rs.3,000/- the plaintiff must execute a deed of conveyance. This is the contract between the parties at the time of sale. When this defendant pressed for a reconveyance deed, the plaintiff issued a mischievous notice dated 12.9.1985 for which this defendant has sent a suitable reply. At the time of sale, it is agreed by this defendant to give some water from his land in S.F.No.428/1 because it is an agreement between the parties that the land should be reconveyed, otherwise this defendant need not agree for the same. The water in the well in S.F.No.428/1 is not even sufficient for one acre of land both the parties shared the water for irrigation in a prudent manner. Now the plaintiff retracted from his contract of agreement. This defendant took possession of the land from the year 1986 onwards and he is in effective possession and enjoyment of the same. The plaintiff has betrayed the trust reposed in him and he must act as a trustee on behalf of the defendant. The allegation in the plaint would indicate that on the date of plaint the plaintiff has been dispossessed of the suit property. The suit is not maintainable. The plaintiff ought to have filed a suit for declaration of his title and also for injunction. Hence, the suit is liable to be dismissed.

3(c) The plaintiff has filed a reply statement denying the averments in the written statement.

3(d) On the above pleadings the learned trial judge has framed three issues and one additional issue. P.W.1 was examined and Ex.A.1 to A.14 were marked on the side of the plaintiffs. On the side of the defendant D.W.1 to D.W.4 were examined and Ex.B.1 to B.5 were marked. By way of a common judgment the learned trial Judge has decreed the suit in O.S.No.43/1986 thereby granting an order of permanent injunction as prayed for by the plaintiff in O.S.No.43/1986 and dismissed the suit in O.S.No.158/1988 with costs. Aggrieved by the findings of the learned trial Judge the defendant in O.S.No.43/1986 has preferred A.S.No.116/1992 and the plaintiff in O.S.158/1988 has preferred A.S.No.117/1992 on the file of the Court of Subordinate Judge,

Ariyalur. In its judgment, the first appellate Court, after due deliberations, has dismissed both the appeals thereby confirming the decree and judgment of the trial Court in O.S.No.43/1986 and O.S.No.158/1988. Hence, these second appeals by Chidambara Udayar, the defendant in O.S.No.43/1986, who is the plaintiff in O.S.No.158/1988.

4. The substantial questions of law involved in this second appeal are as follows:-

i) Whether the Courts below committed an error in law in not calling for the opinion of the expert in respect of Ex.B.3 as held in AIR 1979 Supreme Court page-14?

ii) Whether the lower appellate Court is right in law in totally ignoring the findings of the trial Court before remand in the judgment dated 21.1.1988 in O.S.No.43 of 1986 on the file of the District Munsif's Court, Ariyalur as to the genuineness of Ex.B.3

iii) When Ex.B.3 agreement was properly proved by examining the attestors and scribes, whether not the Courts below erred in law in holding that Ex.B.3 is not proved to be true and valid documents?

5.The Points:-

5(a) The sum and substance of these appeals revolving around the validity and genuineness of Ex.B.3-agreement said to have been entered into between Chidambara Udayar and one Manikkam Udayar. On the basis of Ex.B.3 Chidamara Udayar has filed a suit in O.S.No.158/1988 for specific performance of the contract. Even though the plaintiff in O.S.No.158/1988 has examined 4 witnesses to prove Ex.B.3 (before the trial Court joint trial was conducted in O.S.No.158/1988 and O.S.No.43/1986 and the evidence was recorded in O.S.No.43/1986), both the Courts below have discarded Ex.B.3-document on the ground that it is a concocted document created for the purpose of the case subsequently to the filing of O.S.No.43/1986. The extraneous circumstance which glares at Ex.B.3-document is that it was not shown to P.W.1 Manickam Udayar while he was cross-examined on 25.11.1987. According to Chidambara Udayar, the plaintiff in O.S.No.158/1988, Ex.B.3 was entered into between him and Manikkam Udayar, the defendant in O.S.No.158/1988 who is the plaintiff in O.S.No.43/1986 on 21.11.1987. According to Chidambara Udayar Ex.B.3 agreement was entered into between the parties with an oral agreement that after execution of Ex.B.3 the suit filed by Manikkam Udayar in O.S.No.43/1986 is to be withdrawn. If it is so on the date of chief-examination of P.W.1, i.e., on 24.11.1987 itself, Chidambara Udayar was in possession of Ex.B.3-document because it was executed, according to Chidambara Udayar, on

21.11.1987 itself. Only on 25.11.1987 when Manikkam Udayar was recalled after cross-examination on 24.11.1987 there was a suggestion put to him to the effect that there was an agreement entered into between Chidambara Udayar and Manikkam Udayar on 21.11.1987, which was stealthily denied by Manikkam Udayar.

5(b) The witnesses to Ex.B.3 and the scribe were examined as D.W.2 & 3 (witnesses to Ex.B.3) and D.W.4 (scribe to Ex.B.3). D.W.4-Rahdapillai who is the scribe of Ex.B.3 was also the scribe of Ex.A.1 sale deed dated 1.6.1976 executed by Chidambara Udayar in favour of Manikkam Udayar. He would depose in cross-examination that he went to the Sub-Registrar's Office Ariyalur on 21.11.1987 in connection with some other work and at that time both the plaintiff and the defendant were present and at their request he had written the recitals in Ex.B.3 as a scribe. It is brought to the notice of this Court that 21.11.1987 happens to be a holiday (Saturday). Further if there is an understanding between the parties to execute a reconveyance that would have been reflected in Ex.A.1 itself. But there is no recital in Ex.A.1-sale deed to the effect that at a later stage the parties have agreed to reconvey the same.

5(c) Both D.W.2 and D.W.3 would depose that there was two copies prepared for Ex.B.3-document. If it is so, Manikkam Udayar P.W.1 in O.S.No.43/1986 would have possessed with one of the copies of Ex.B.3. But there is no suggestion put to Manikkam Udayar (P.W.1) to the effect that he was also supplied with a copy of Ex.B.3 even on the date of execution of the same. Ex.B.3 was not at all shown to P.W.1-Manikkam Udayar at the time of his deposition. This definitely will have an adverse impact on Chidambara Udayar, plaintiff in O.S.No.158/1988.

5(d) Yet another pertinent point which glares at the case of the plaintiff in O.S.No.158/1988 Chidambara Udayar, is that being a plaintiff to file a suit for specific performance of contract, it is the bounden duty of the plaintiff to prove that he was always ready and willing to perform his part of the contract. But to our surprise Chidambara Udayar, the plaintiff in O.S.No.158/1988 has not even sent a notice to Manikkam Udayar, the defendant in O.S.No.158/1988 informing him that he is always ready and willing to perform his part of the contract and also demanding him to execute a reconveyance deed as per the terms of Ex.B.3.

5(e) Further for comparison of the signature as provided under Section 73 of the Indian Evidence Act, the Court is competent to compare the disputed signature of a person with that of an admitted signature and then to come to the conclusion whether the disputed signature is genuine or not. A perusal of the judgment of the trial Court will go to show that at the bottom of para 16 the learned trial Judge has compared the disputed signature of Manikkam Udayar in Ex.B.3 with that of the

admitted signature of Manikkam Udayar in plaint in O.S.No.43/1986 and also his signature in his deposition and Vakalat and has come to a definite conclusion that the disputed signature in Ex.B.3 of Manikkam Udayar is not that of the admitted signature of Manikkam Udayar found in the plaint, Vakalat and deposition. So the contention of the learned counsel for the appellant that the disputed signature in Ex.B.3 was not sent to an expert cannot hold any water because the court itself is competent to compare the disputed signature with the admitted signature as contemplated under Section 73 of the Indian Evidence Act to arrive at a conclusion. If, dispute is regarding the thumb impression of a person then definitely an expert's opinion is necessary to arrive at a conclusion whether the thumb impression in the disputed document and the admitted thumb impression belonged to one and the same person. So under such circumstance, if Ex.B.3 goes the plaintiff in O.S.No.158/1988 viz. Chidambara Udayar has no case for specific performance of the contract. Under Ex.A.1-sale deed Manikkam Udayar as plaintiff has filed the suit for injunction. Even under Ex.A.1 the possession was handed over to Manikkam Udayar the plaintiff in O.S.No.43/1986 on the date of execution of Ex.A.1-sale deed in respect of the suit property. There is absolutely no evidence contra on the side of the Chidambara Udayar, defendant in O.S.No.43./1986, to show that he is in possession of the suit property. Under such circumstance, both the court below have come to the correct conclusion that plaintiff in O.S.No.43/1986 is entitled to an order of permanent injunction as prayed for and the plaintiff in O.S.No.158/1988 is not entitled to the relief of specific performance of the contract on the basis of Ex.B.3. I do not find any reason to interfere with the well considered judgment of the Courts below, which is concurrent in nature, which do not warrant any interference from this Court. Points are answered accordingly.

6. In fine, S.A.Nos.745 & 746 of 1997 are dismissed confirming the decree and judgment in A.S.No.117 & 116 of 1992 respectively, on the file of the Subordinate Judge, Ariyalur, with costs throughout.
Ssv

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Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

1. The Subordinate Judge, Ariyalur. (with records if any)

2. The District Munsif, Ariyalur.

3. The Record Keeper, VR Section, High Court, Madras

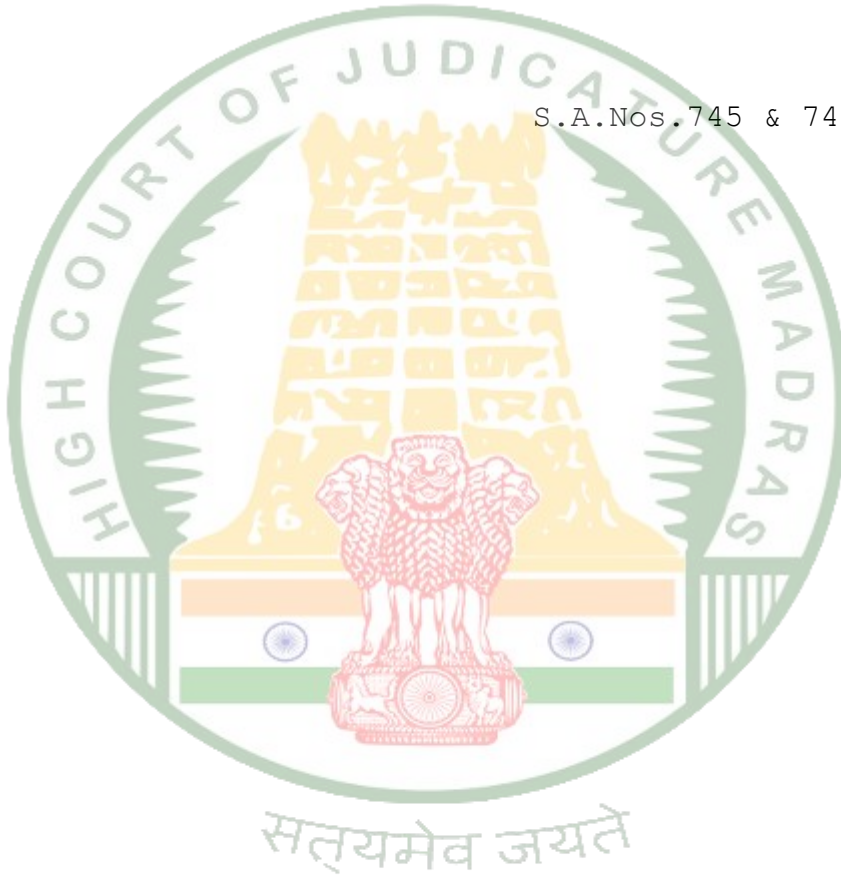
+2cc to M/s. Sarvabhuman Associates, sr no. 11755

+2ccs to Mr. S. Mani, Advocate sr no. 11956 and 11957

GM(CO)

NM(23.03.07)

S.A.Nos.745 & 746 of 1997



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